

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:11-cr-00288-MOC

UNITED STATES OF AMERICA,

Vs.

LUIS FERNANDO GONZALEZ,

Defendant(s).

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ORDER

THIS MATTER is before the court on defendant's Motion for a Rule 37 Indicative Ruling. The government has not opposed the motion within the time allowed. See L.Cr.R. 47.1(E).

On November 27, 2012, this court sentenced defendant at Offense Level 28 and Criminal History Category II to 87 months imprisonment, which was at the low end of the advisory guidelines range. Judgment was entered January 17, 2013, and defendant promptly filed a Notice of Appeal. Defendant contends that on January 23, 2013, the North Carolina General Court of Justice, District Court Division, vacated a conviction which had moved his Criminal History from Category I to Category II. Defendant argues that such now-vacated conviction not only elevated the advisory guidelines range, it also prevented application of the safety-valve provisions of §5C1.2 of the United States Sentencing Guidelines.

Although this matter is now on appeal to the Fourth Circuit, defendant seeks relief from this court under newly effective Rule 37, Federal Rules of Criminal Procedure (added Jun. 30, 2011, eff. Dec. 1, 2012). In pertinent part, Rule 37 provides, as follows:

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

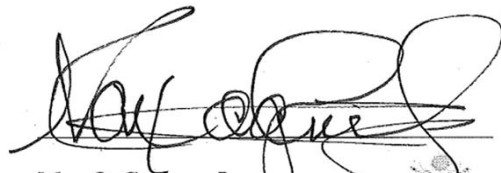
(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed.R.Crim.P. 37(a). Having considered the pending motion in light of Rule 37 and United States v. Pettiford, 612 F.3d 270 (4th Cir. 2010), the court determines that defendant has presented a substantial issue meriting a hearing. Having considered defendant's motion and reviewed the pleadings, the court enters the following Order.

ORDER

IT IS, THEREFORE, ORDERED that upon defendant's Motion for a Rule 37 Indicative Ruling (#73), the court finds under Rule 37(a)(3) that such motion presents a substantial issue meriting a hearing.

Signed: February 26, 2013



Max O. Cogburn Jr.
United States District Judge